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No. 95-548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN H. MARTIN, *et al.*,
Petitioners,

vs.

DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The Petition for Writ of Certiorari is due to be granted. The respondents have joined issue on the question presented, *viz.*, whether a state court class action judgment wholly or predominately for money damages may bar the individual claims of absent class members who had minimum contacts with the forum state but who were not provided with an opportunity to "opt out" of the class as required by due process. The reasons offered by respondents for denial of the petition are without merit. This case presents a question of importance on which the lower courts are in irreconcilable conflict. In addition, this case provides an appropriate vehicle with which to resolve this question.

I. There is a conflict among the lower courts that requires resolution by this Court.

The Alabama Supreme Court's decision in this case stands in square conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (CA9 1992), *cert. granted,*, 114 S.Ct. 56 (1993), *cert. dismissed per curiam*, 114 S.Ct. 1359 (1994). In the proceedings below, the Alabama Supreme Court held that an absent class plaintiff can be bound by a class judgment for money damages even if he were not afforded a right to opt out of the class, so long as the absent class plaintiff possessed minimum contacts with the forum state. That conclusion, which is inconsistent with the requirements of procedural due process as defined by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), is directly contrary to the one reached by the Ninth Circuit in *Ticor*. The *Ticor* court held that "minimal due process requires that 'an absent class plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court,' if monetary claims are involved." 982 F.2d at 392 (quoting *Shutts*, 472 U.S. at 812). The Ninth Circuit in no way qualified its holding to apply only when the absent class plaintiff lacks minimum contacts. Instead, the Ninth Circuit applied the plain language of *Shutts*, which requires that an opt-out right be provided to all absent class plaintiffs who have claims predominately for money judgments. Contrary to the suggestions of respondents, the conflict between the Alabama Supreme Court and the Ninth Circuit is real.

The confusion that exists among the state and federal courts concerning the meaning of *Shutts* is quite evident. In its decision below, the Alabama Supreme Court confessed that it was unclear as to the meaning of *Shutts*. The Alabama court stated:

> We are not sure how far *Shutts* . . .reach[es] in this situation; indeed, the United States Supreme Court, as we read *Ticor* [*Title Insurance Co. v. Brown*,, 511 U.S. ___, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994)], seems unsure of the reach of *Shutts*.

(Pet. for Cert., at 44a-45a) (footnote omitted). When a lower court is in such a state of uncertainty over the meaning of a precedent of this Court, there is a compelling need for resolution of the uncertainty. The fact that this Court initially granted the petition for certiorari in *Ticor* suggests that this Court recognized the conflict that exists over this question among the lower courts. As made clear in the Petition for Writ of Certiorari in this case, the problems that prevented this Court from deciding the question in *Ticor* are absent here. Thus, this case presents an ideal vehicle for the Court to resolve this troubling question that continues to plague the lower courts.

II. Respondents seek to undermine the Constitution's procedural due process protections.

This Court's decision in *Shutts* makes plain that an absent class plaintiff *must* be provided with an opportunity to opt out of the class in order for the judgment to be binding on that absent class member. The *Shutts* Court stated: "In addition, we hold that due process requires at a minimum that an absent class member be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812. Respondents in their brief never come to grips with that holding. Instead, they seek to divert the Court's attention through the use of gimmicks, such as counting the number of times the word "jurisdiction" is

used in the *Shutts* opinion.[1] The respondents, however, do not and cannot provide an explanation as to why the clear language of *Shutts* should be ignored..

Respondents' arguments concerning an alleged waiver by the petitioners of their procedural due process rights would render meaningless the constitutional protections of *Shutts*. Respondents suggest that petitioners have waived their rights because, after receiving two first-class mail notices of hearings in Delaware concerning the class judgment, petitioners did not appear at the hearings to challenge the class judgment or request that the Delaware court exercise its discretionary power under state law to provide opt-out rights. This argument, if accepted, would stand *Shutts* on its head. The requirement of opt-out rights mandated by *Shutts* is designed to prevent the need for an absent class plaintiff to appear at any court hearing or to be forced to request an opt-out. The *Shutts* Court contemplated a simple form that could be filled out by the absent class plaintiff if he wanted to be excluded. Under the respondents' circular reasoning, the mandatory duty to provide absent class plaintiffs an opportunity to opt out would be discharged if the absent class plaintiffs are merely told when a hearing would take place on the class judgment. Such an argument cannot be taken seriously.[2]

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[1] Drummond also alludes in a footnote to an alleged statute of limitations problem in the Alabama courts. (Resp. Brf. p. 14, n. 8). Pretermitting the fact that the Alabama Supreme Court noted no such problem, the statute of limitations was clearly tolled during the pendency of *Hynson*. In a trilogy of cases, this Court embraced the principle that the filing of a class action tolls the applicable statute of limitations for *all* class members. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554-55 (1974).

[2] The additional claim by respondents that petitioners actually appeared in the *Hynson* case by allegedly filing briefs is belied by the fact that the Delaware chancellor held that petitioners made no appearance in his court. (Resp. Brf. p 26a).

There is also no basis for respondents' claim that petitioners are barred from collaterally attacking the class judgment in *Hynson*. Since this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), collateral attacks have been considered an integral part of the class action process. The *Hansberry* Court held that, if the res judicata effect of a prior judgment is collaterally attacked on due process grounds, it is the duty of the reviewing court to examine the prior litigation to determine if the complainant was afforded due process. 311 U.S. at 40. Although petitioners have conceded that they had minimum contacts with Delaware, that is not the end of the constitutional inquiry. If respondents had provided petitioners with an opportunity to opt out in *Hynson*, there could be no collateral attack. But, no such opportunity was provided. Accordingly, respondents must live with the consequences of the constitutional deficiencies of the proceedings in *Hynson*.

Finally, the argument that the petitioners cannot collaterally attack the *Hynson* judgment appears to have been put to rest by this Court in its opinion dismissing certiorari in the *Ticor* case. Both the per curiam majority and the dissent made it clear that the constitutional issue could be raised on collateral attack, as it had been in the Ninth Circuit. At least implicit in the *Ticor* opinions is the recognition that a constitutional challenge on due process grounds may be brought collaterally.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, this Court should grant the petition to review the important question presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. North, a member of the Bar of this Court, hereby certify that on this 8th day of November, 1995, three copies of the Reply Brief of Petitioners in the above-entitled case were mailed, first class postage prepaid, to the following:

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